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Supreme Court of the United States

OCTOBER TERM, 1996

CITY OF NEW YORK; RUDOLPH GIULIANI, Mayor, City of New York; WILLIAM BRATTON, Chief, New York City Police Department; ROBERT MORGENTHAU, District Attorney–New York County; RICHARD A. BROWN, District Attorney–Queens County; WILLIAM L. MURPHY, District Attorney–Richmond County; CHARLES H. HYNES, District Attorney–Kings County; ROBERT F. JOHNSON, District Attorney–Bronx County; ALFRED C. CERULLO, III, Commissioner of New York City Department of Consumer Affairs; NEW YORK CITY DEPARTMENT OF CONSUMER AFFAIRS; HENRY J. STERN, Commissioner, New York City Department of Parks & Recreation; MARILYN GELBER, Commissioner of the Department of Environmental Protection of the City of New York; ENVIRONMENTAL CONTROL BOARD OF THE CITY OF NEW YORK and ANNE J. MCCARTHY, Executive Director of the Environmental Control Board of the City of New York,

Petitioners,

—v.—

ROBERT BERY, JAMES ALBERT HARRIS, ANNE REISS, RICARDO ANTONIO PASCUAL, ARTISTS FOR CREATIVE EXPRESSION ON THE SIDEWALKS OF NEW YORK CITY, ROBERT LEDERMAN, JODI BOGUS, KNUT MASCO, ALEXIS PORTILLA and ARTHUR ROBINS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPPOSITION TO PETITION FOR CERTIORARI BY RESPONDENTS ROBERT LEDERMAN, JODI BOGUS, KNUT MASCO, ALEXIS PORTILLA AND ARTHUR ROBINS

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QUESTIONS PRESENTED

1. Did the Court of Appeals properly conclude that a local vendor licensing regulation violated the First and Fourteenth Amendments where the regulation operated as a *de facto* ban on the display and sale of visual art and was not narrowly tailored to promote a significant governmental interest?

2. Did the Court of Appeals properly conclude that a local vendor licensing regulation violated the Equal Protection Clause of the Fourteenth Amendment where the regulatory scheme discriminated between written expression on one hand and visual expression on the other hand?

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ADDITIONAL CONSTITUTIONAL AND STATUTORY PROVISIONS

Fourteenth Amendment, United States Constitution

Section 1. ... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

General Vendors Law,
New York City Admin. Code § 20-452 et seq.

§ 20-465 **Restrictions on the placement of vehicles, pushcarts and stands; vending in certain areas prohibited.** a. No general vendor shall engage in any vending business on any sidewalk unless such sidewalk has at least a twelve-foot wide clear pedestrian path to be measured from the boundary of any private property to any obstructions in or on the sidewalk, or if there are no obstructions, to the curb. In no event shall any pushcart or stand be placed on any part of a sidewalk other than that which abuts the curb.

b. No general vendor shall occupy more than eight linear feet of public space parallel to the curb in the operation of a vending business and, in addition, no general vendor operating any vending business on any sidewalk shall occupy more than three linear feet to be measured from the curb toward the property line.

c. No vending vehicle, pushcart, stand, goods or any other item related to the operation of a vending business shall touch, lean against or be affixed permanently or temporarily to any building or structure including, but not limited to lamp posts, parking meters, mail boxes, traffic signal stanchions, fire hydrants, tree boxes, benches, bus shelters, refuse baskets or traffic barriers.

d. No vending pushcart, stand or goods shall be located against display windows of fixed location businesses, nor shall they be within twenty feet from an entranceway to any building, store, theatre, movie house, sports arena or other place of public assembly.

e. No general vendor shall vend within any bus stop or taxi stan, or within ten feet of any driveway, any subway entrance or exit, or any corner. For purposes of this subdivision, ten feet from any corner shall be measured from a point where the property line on the nearest intersecting block face, when extended, meets the curb.

* * *

g. No general vendor shall vend on any street which is a C4, C5, or C6 zoning district, or in the area bounded on the east by Second Avenue, on the south by Thirtieth Street, on the west by Ninth Avenue and Columbus Avenue and on the north by Sixty-fifth Street, except that as chairperson of the street vendor review panel established pursuant to section 20-465.1 of this subchapter, the commissioner of the department of business services or his or her designee may receive

applications from any person, group, organization or other entity to permit general vendors on any street within said area or said zones, or to prohibit general vendors on any other street. Such applications shall be considered by the street vendor review panel in accordance with the procedures enumerated in section 20-465.1 of this subchapter.

* * *

k. Where exigent circumstances exist and a police officer or other authorized officer or employee of any city agency gives notice to a general vendor to temporarily move from any location such general vendor shall not vend from such location. For the purposes of this subdivision, exigent circumstances shall include, but not be limited to, unusually heavy pedestrian or vehicular traffic, existence of any obstructions in the public space, an accident, fire or other emergency situation, a parade, demonstration or other such event or occurrence at or near such location.

* * *

m. No general vendor shall vend over any ventilation grill, cellar door, manhole, transformer vault, or subway access grating.

n. No general vendor shall vend using the surface of the sidewalk, or a blanket or board placed immediately on the sidewalk or on top of a trash receptacle or cardboard boxes to display merchandise. No general vendor display may exceed five feet in height from ground level. The display

may not be less than twenty-four inches above the sidewalk where the display surface is parallel to the sidewalk, and may not be less than twelve inches above the sidewalk where the display surface is vertical. Where a rack or other display structure is placed on top of or above a table or other base, the size of the base shall not be less than the size of the display structure placed thereon. Nothing shall be placed on the base so as to exceed the size limitations contained in this section. No general vendor shall use any area other than that area immediately beneath the surface of the display space for the storage of items for sale.

* * *

q. No general vendor shall vend: 1. within twenty feet from sidewalk cafes; 2. within five feet from (a) bus shelters, (b) newstands, (c) public telephones or (d) disabled access ramps; and 3. within ten feet from entrances or exits to buildings which are exclusively residential at the street level.

STATEMENT OF THE CASE

Respondents Robert Lederman, Jodi Bogus, Knut Masco, Alexis Portilla and Arthur Robins are individual artists who sell their paintings, sculpture and prints on the public sidewalks of New York City (the "City"). JA 121, 136, 243, 255, 263.[1] They commenced this action because the City's general vendor licensing scheme has placed them in an untenable position. Respondents can allow themselves to be silenced by forsaking their expression in light of the impossibility of obtaining general vendor licenses required by the City, or they can engage in their expression and subject themselves to arrest, confiscation (and often destruction) of their original works of art, $250 tickets and police threats.

The City has two regulatory structures addressed to vending on its public sidewalks. One is the licensing requirement at issue here which makes it unlawful to sell in public spaces any non-food items, be they tube socks, batteries or original Vermeers, without a license. N.Y. City Admin. Code § 20-453. The other regulates the time, place and manner of how a vendor may set up a display. N.Y. City Admin. Code § 20-465.

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[1] References to the Appendix to the Petition for Certiorari are indicated by the letter "A" followed by the relevant page number in the Appendix. References to the Joint Appendix filed in the Court of Appeals are indicated by the letters "JA" followed by the relevant page numbers.

As part of the first regulatory structure, the City requires a general vendor license and imposes an arbitrary limit of 853 licenses. Rather than arriving at the 853 number after a rational analysis, the City settled on its limit because exactly that many licenses happened to exist on September 1, 1979. N.Y. City Admin. Code § 20-459(a). All of the 853 licenses have been taken, and their holders can, and usually do, renew them from year to year. N.Y. City Admin. Code § 20-457 (a); JA 221. The City has admitted that respondents cannot now obtain general vendor licenses, JA 297 (Answer, ¶ 18), and respondents' experiences have borne out that fact. JA 123-24, 205, 216, 244, 263. There is no question that the general vendor licensing requirement imposes an effective ban on the sale of respondents' original art on the sidewalks of the City.[2]

Although the City's stated purpose for the limit on the number of general vendor licenses is to reduce congestion, JA

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[2] Notwithstanding this ban, as early as 1979, the City's licensing authority, the Department of Consumer Affairs, expressed the opinion that an artist's First Amendment rights precluded enforcement of the licensing scheme against him: "In the opinion of this Department it has been determined, as per the First Amendment, that if you only create and sell your own paintings and drawings within the City of New York you are not required to obtain a General Vendor License." JA 219. As recently as September 28, 1994, the City's Mayor Giuliani declared to an open forum that "I do recognize that artists have a First Amendment right to display and sell their art on the public streets of New York City." JA 122.

147 (L.L. 50/1979 § 1), the City does not impose an actual limit on the number of vendors who can sell in public spaces. Built into the City's regulation is an exemption that permits an unlimited number of persons to sell materials on the street without the need for a license, so long as those materials consist exclusively of "newspapers, periodicals, books, pamphlets or other similar written matter." N.Y. City Admin. Code § 20-453. Accordingly, vendors of used magazines or baseball cards are not so restricted as artists who sell their own creations. The City added this written matter exemption to the licensing regulation in 1982 because it believed it was "consistent with the principles of free speech and freedom of the press to eliminate restrictions on the vending of written matter." JA 147 (L.L 33/1982 § 1).

Also excluded from the City's licensing requirement are veterans of foreign wars and their spouses. Any number of these persons can obtain a unique vending license pursuant to state law and, with such licenses, can sell anything -- including original works of art -- on the City's sidewalks. N.Y. Gen. Bus. Law § 32 (McKinney 1988).

The City's second set of regulations, which is not challenged here, is addressed to the time, place and manner of vendor displays and applies to both licensed and unlicensed vendors, including vendors of written matter. Unlike a city-wide numerical cap on licenses, these regulations are addressed to preventing congestion on the streets. Pursuant to these regulations vendors are restricted to sidewalks that are 12 feet wide; they must keep their displays to no more than eight linear feet parallel to the curb and three linear feet

perpendicular to the curb; they may not allow their displays to abut other structures, including fire hydrants; and they must position their displays at least 20 feet from the entrance a buildings. N.Y. City Admin. Code § 20-465(a)-(d). In addition, the City has composed a list of streets on which vendors may not sell, and it has declared much of midtown Manhattan off limits to non-food vendors. N.Y. City Admin. Code § 20-465(g). These regulations further provide that in exigent circumstances -- such as unusually heavy pedestrian or vehicular traffic, obstructions in public spaces, accidents, fires or other emergency situations -- a general vendor is required to move his or her display upon notice from a police officer or other authorized employee of a City agency. N.Y. City Admin. Code § 20-465(k). These rules were "designed to prevent or minimize sidewalk and roadway congestion." JA 150.

Respondents do not have ready access to fora other than the public sidewalks for displaying and selling their works of art. JA 122. While New York is a city of galleries and museums, the space in those institutions is limited and usually reserved for a small number of highly prominent artists. Respondents thus turn to the sidewalks as a place where they can share their art with the public. In fact, the City's sidewalks have become a source of inspiration and ideas for respondents' art and have provided a means for direct communication with the viewing public that is not available elsewhere. JA 122-23, 204-5. Members of the public, in turn, are provided with the opportunity to view original art work and be exposed to its information and ideas

even if they would not be inclined to visit a museum or gallery. JA 122.

Respondents' ability to engage in their expression on the City's sidewalks has been curtailed by the City's requirement of an unobtainable license. Most obviously, they have been unable to share those works that have been confiscated by the police, and they have lost the opportunity to display and sell their art when they have been taken to jail for vending without a license. The effect of the City's enforcement of § 20-453 against respondents, however, has more subtle aspects. The fear of losing their works has led respondents to refrain from displaying their finest pieces, thereby depriving themselves and the public of the opportunity to engage in that communication. JA 205, 245. Other artists have simply been chilled from selling at all.

REASONS WHY THE WRIT SHOULD BE DENIED

The writ should be denied because the Court of Appeals properly applied two established principles of First Amendment law. First, the guarantees of the First Amendment apply to a broad range of expression, including respondents' display and sale of their art. Second, the First Amendment will not suffer a regulation, like the City's, that is not narrowly tailored and serves as an effective city-wide ban on a form of expression.

I. Visual Art Is Protected by the First Amendment

Like the written or spoken word, visual art can communicate, enlighten, provoke, enrich and offend. There is no real doubt that, like verbal expression, visual expression is entitled to the protection of the First Amendment. While the language of the First Amendment refers to guarantees for "speech" and "press," this Court has not restricted the amendment's protections to a narrow interpretation of these terms. Accordingly, protection has been found for a broad array of expression, including music, film, theater, and other arts. *See, e.g., Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557-58 (1975); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501-02 (1952). In addition, this Court has not required that expression convey a particularized message in order to be entitled to the protection of the First Amendment. *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 115 S. Ct. 2338 (1995) (St. Patrick's Day parade itself, not just its constituent elements, constituted a form of expression).

Paintings, sculpture and other plastic arts, such as those practiced by respondents, are clearly forms of expression entitled to protection under the First Amendment. In fact, Jackson Pollock's splatter paintings have been featured by this Court as examples of expression that is "unquestionably shielded" (along with Arnold Schönberg's music and Lewis Carroll's Jabberwocky verse). *Hurley*, 115 S. Ct. at 2345. Like music and drama, the plastic arts have as their purpose the expression of ideas and emotions. Visual

art is one of the oldest forms of expression, predating (and eventually merging into) the written word as a means of communication. Visual art is a type of communication that has the ability to transcend the bounds of illiteracy and language limitations, conveying messages beyond the constraints of the written word. In other respects, visual art is inextricably connected to written words. The ancient Egyptians formulated their hieroglyphics out of artistic images; modern Chinese characters meld the pictorial and the linguistic; René Magritte painted words under his depiction of a pipe to instruct the reader/viewer that "this is not a pipe"; William Blake drew his poetry within and as part of colorful images of nature, humanity and deities. A painter's canvas or a sculptor's molded form embodies the creator's expression as does a writer's manuscript.

The expressive characteristics of visual art, and accordingly its protection under the First Amendment, have been recognized repeatedly by this Court. In addition to this Court's statements about Jackson Pollock's paintings in its unanimous decision in *Hurley*, it noted in *Miller v. California*, 413 U.S. 15, 34 (1973), that the "First Amendment protects works which, taken as a whole, have serious literary, artistic, political, or scientific value." In *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 632 (1943), the Court described visual images as "a primitive but effective way of communicating ideas ... a short cut from mind to mind." And in *Joseph Burstyn*, 343 U.S. at 501, it wrote that artistic expression "may affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought." That visual

art is a protected form of expression was also recognized in *Piarowski v. Illinois Community College Dist. 515*, 759 F.2d 625, 628 (7th Cir.), *cert. denied*, 474 U.S. 1007 (1985). The stained glass windows there at issue were found by the Seventh Circuit to make no political statement; rather, they constituted "art for art's sake." As such, they were nevertheless protected under the First Amendment's guarantees of both freedom of speech and freedom of the press.[3] *See also Contemporary Arts Ctr. v. Ney*, 735 F. Supp. 743, 744 (S.D. Ohio 1990) ("In the absence of a judicial finding that the [Robert Mapplethorpe] photographs in question are obscene, they are entitled to the protection of the First Amendment."); *Cernuda v. Heavey*, 720 F. Supp. 1544, 1549 (S.D. Fla. 1989) ("Artwork, like other forms of expression, is within the ambit of speech that receives First Amendment protection.").

In addition to the art itself, respondents' sale of their art is protected because it is inextricably intertwined with the expression. This Court has already held that removing the financial incentive for expression can offend the First Amendment where the result is less expression. Thus, in *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 756 n.5 (1988), it rejected a municipal permit scheme for newsracks

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[3] While some viewers may have inferred a racist or sexist message in the windows, the court did not base its decision on this possibility. Rather, "freedom of speech and of the press protected by the First Amendment has been interpreted to embrace the purely artistic as well as political expression." *Piarowski*, 759 F.2d at 628.

because the restriction on selling newspapers infringed the publisher's rights: "the degree of First Amendment protection is not diminished merely because the newspaper or speech is sold rather than given away." The Court took a realistic approach to the financial aspect of encouraging expression: "[t]he actual 'activity' at issue here is the circulation of newspapers, which is constitutionally protected. After all, 'liberty of circulating is as essential to [freedom of expression] as liberty of publishing; indeed, without the circulation, the publication would be of little value.'" *Id.* at 768 (quoting *Ex Parte Jackson*, 96 U.S. 727, 733 (1878)).

Most recently, this Court recognized the relation between financial rewards and expression in *United States v. National Treasury Employees Union*, 115 S. Ct. 1003 (1995). In that case, it struck down a federal prohibition on government employees' accepting honoraria for speeches and articles unrelated to their job responsibilities. The restriction did not prohibit speech, nor did it discriminate among speakers based on their views, yet "its prohibition on compensation unquestionably imposes a significant burden on expressive activity." *Id.* at 1014. Once again, the Court recognized that the practical result of banning remuneration for expression was less expression. Quoting Samuel Johnson, it noted "[n]o man but a blockhead ever wrote except for money." *Id.* at 1014 n.14 (citation omitted); *see also Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105 (1991) (striking state's "Son of Sam" law that required financial rewards from books relating to a convicted criminal's crimes to be paid to victims); *Joseph Burstyn*, 343 U.S. at 501-02 ("That books, newspapers, and magazines are

published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment. We fail to see why operation for profit should have any different effect in the case of motion pictures." (footnote omitted)).

The City itself recognizes that the sale of expression is protected by the First Amendment. In creating the written matter exemption to its vendor licensing scheme, it specifically focused on *the sale* of written matter when it strove (albeit in too limited a manner) to remain "consistent with the principles of free speech and freedom of the press."

Furthermore, reducing expression by banning a financial incentive to engage in it impinges not only on the rights of the speaker, but also on those of the listener. In *National Treasury Employees*, this Court stated that "[t]he large-scale disincentive to Government employees' expression also imposes a significant burden on the public's right to read and hear what the employees would otherwise have written and said. We have no way to measure the true cost of that burden, but we cannot ignore the risk that it might deprive us of the work of a future Melville or Hawthorne." 115 S. Ct. at 1015 (internal citations omitted).

Respondents' works of art, and their sale of those works, fit squarely within the foregoing precedent. First, the First Amendment's guarantees clearly apply to visual art. Second, respondents' sale of their art is inextricably intertwined with their protected expression, for the removal of the financial incentive for their expression has led to less

expression: the City's *de facto* ban on respondents' selling their works of art has caused respondents to refrain from displaying and selling their art and to keep their best works away from the public eye for fear that they will be confiscated and destroyed. Section 20-453 clearly implicates respondents' First Amendment rights, and the Second Circuit's ruling appropriately preserves those rights.

II. The City's Effective Ban on a Form of Expression Runs Afoul of the First and Fourteenth Amendments

Section 20-453 of the City's Admin. Code impermissibly impinges respondents' rights because it concededly serves as an effective ban on their expression throughout the entire city. The result is that respondents must choose between the Scylla of silence and the Charybdis of arrest and confiscation when they engage in their expression without the unobtainable general vendor license.

The Ninth Circuit's decision in *One World One Family Now v. City and County of Honolulu*, 76 F.3d 1009 (9th Cir.), *cert. denied*, 117 S. Ct. 554 (1996), does not represent a split among the circuits or even a split from the Second Circuit's decision below. First, consistent with the decision below, the Ninth Circuit reaffirmed an earlier decision that message-bearing t-shirts and their sale are entitled to the protection of the First Amendment. *Id.* at 1012 (citing *Gaudiya Vaishnava Soc'y v. City and County of San Francisco*, 952 F.2d 1059 (9th Cir. 1990), *cert. denied*, 504

U.S. 914 (1992)). Second, the regulation at issue in *One World* was substantially different from the restriction challenged in the present action. The Ninth Circuit was not faced with an effective city-wide ban on a form of expression, whether in the guise of a licensing requirement or otherwise. Instead, it examined an effort by a municipality to zone creative t-shirt vendors by restricting them with respect to one area within the City of Honolulu. At most, that regulation is akin to New York City's designation (not challenged here) of a portion of midtown Manhattan as restricted to general vendors. See N.Y. City Admin. Code § 20-465(g). There is no basis for a claim that the circuits are split on issues raised below.

In analyzing the City's licensing requirement, the Court of Appeals below suggested that, because the scheme draws distinctions between written and pictorial forms of expression, it should be subject to a strict scrutiny analysis. A 17-18. The court did not reach that issue, however, because it found the regulation fails even under a less stringent standard: it is not narrowly tailored to serve a significant governmental interest, and it does not leave open ample alternative channels for communication.

Inconsistencies and exceptions in government regulations have caused this Court to question the interests asserted to justify them. Thus in *National Treasury Employees*, Justice O'Connor, concurring in part and dissenting in part, was led to doubt the governmental interest in the honoraria ban due to its "patchwork nature." 115 S. Ct. at 1022. In that case, the regulation that the Court

struck down was riddled with inconsistencies because federal "employees may receive honoraria for poems, but not for speeches on poetry. Employees may be compensated for writing chapters in books but not for writing the same piece if published as an article." *Id*; *see also City of Ladue v. Gilleo*, 114 S. Ct. 2038, 2044 (1994) ("[e]xemptions from an otherwise legitimate regulation of a medium of speech may be noteworthy for a reason quite apart from the risks of viewpoint and content discrimination: they may diminish the credibility of the government's rationale for restricting speech in the first place.").

The City's licensing requirement also suffers from a patchwork nature. It restricts the number of general vendor licenses, but not the number of vendors. In fact, as a result of the written matter exemption and the separate licenses for veterans, there is no limit to the number of vendors who can be present on the City's streets. The 853 licensed vendors can easily be outnumbered by a limitless number of written matter vendors. *See City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 426 (1993) (striking down attempt to limit newsracks containing commercial handbills because, if the purpose was to limit the overall number of newsracks, newspapers were the greater culprit). The City's regulatory scheme allows the unlicensed sale of books that contain reproductions of original art, but bars such sale of the original works themselves. Moreover, under the City's definition, one presumably does not need a license to sell art consisting of enough words to constitute written matter, but does need a license if the art lacks sufficient words.

In marked contrast to the licensing scheme which does not affect the total number of vendors, the time, place and manner regulations found at § 20-465 of the City's Administrative Code actually address the matter of congestion on the City's streets and sidewalks. It is these regulations that ensure that doorways are clear, that the hydrants remain accessible, and that vendors move in exigent circumstances.[4]

The patchwork licensing scheme's effective ban on a form of expression cannot be excused on the claim that the task of differentiating between protected expression and everything else may at times be difficult. It is, of course, the legislative function to grapple with such issues in an effort to comply with constitutional dictates. New York State has sought to perform this legislative line-drawing function, for example, in determining who is an "artist" for purposes of qualifying for subsidized loft space. N.Y. Mult. Dwell. Law § 276 (McKinney 1996). The City has done the same in interpreting the bounds of its own regulations concerning its vendor licensing scheme. For purposes of applying the written matter exemption, the City has drawn a line allowing the unlicensed vending of "printed material which, taken in its entirety, seeks to express ideas or thoughts through the written word." JA 157, 196. In other words, the City decides (within the narrow category of written matter) what

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[4] These time, place and manner regulations, rather than the licensing requirement, were the subject of *Duchein v. Lindsay*, 345 N.Y.S.2d 53 (1st Dep't 1973), *aff'd*, 311 N.E.2d 508, *appeal dismissed*, 419 U.S. 809 (1974), which was cited in the Petition.

is expressive. Baseball cards, in the City's view, are sufficiently expressive through the written word to qualify for the exemption; calendars and maps are not. Though these specific comparisons may be flawed, the City cannot impose a ban on visual expression on the claim that distinctions between expressive and non-expressive material cannot be drawn.

Because the City's regulation imposes an effective city-wide ban on respondents' expression, *a fortiori*, it fails to leave open ample alternative channels for communication. The City cannot escape this requirement by glibly suggesting unrealistic alternatives, such as respondents' private property, for selling their art. It must leave open alternative *public* channels for communication. Thus in *Southeastern Promotions*, 420 U.S. at 556, private theaters were not considered an appropriate alternative when a production of the musical *Hair* was improperly excluded from a public theater. According to the Court, "[e]ven if a privately owned forum had been available, that fact alone would not justify an otherwise impermissible prior restraint. '[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.'" *Id.* (quoting *Schneider v. State of New Jersey, Town of Irvington*, 308 U.S. 147, 163 (1939)); *see also Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 76-77 (1981) (ban on live entertainment in one town could not be justified by the existence of live entertainment in a neighboring town). The Court of Appeals properly concluded, based on these principles, that the City provides no public alternatives and

that, for this independent reason, the regulation failed to withstand even intermediate scrutiny. A 21-22.

In addition to violating the First Amendment, the City's licensing scheme runs afoul of the Fourteenth Amendment's Equal Protection Clause. "[W]hen government regulation discriminates among speech-related activities in a public forum, the Equal Protection Clause mandates that the legislation be finely tailored to serve substantial state interests, and the justifications offered for any distinctions must be carefully scrutinized." *Carey v. Brown*, 447 U.S. 455, 461-62 (1980) (citations omitted). As demonstrated above, the City's regulation clearly concerns speech-related activities, for respondents' sale of their art, just as a publisher's sale of newspapers or a theater's presentation of a film, raises the fundamental right of free speech. The City's regulation also discriminates among such speech-related activities by dividing protected expression into favored and disfavored categories. Under the written matter exemption, anyone who chooses to sell written materials, be they works in the "canon" of literature or baseball cards, may do so without a license. Respondent artists fall into the disfavored category. Because they express through the visual image, they can only sell their works if they posses the unobtainable general vendor license. For the reasons described above, this scheme is not finely tailored to promote a significant government interest. Rather, it serves to limit too much speech by exempting only some expression. *See City of Ladue*, 114 S. Ct. at 2039.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of *certiorari* should be denied.

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